INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Carroll v. *United States*, 69 C. Cls. 435	8
Crook Co. v. *United States*, 59 C. Cls. 593, affirmed, 270 U. S. 4	8
Fore River Shipbuilding Co. v. *United States*, 62 C. Cls. 307	8
Gillen v. *United States*, 88 C. Cls. 347	9
Karno-Smith Co. v. *United States*, 84 C. Cls. 110	8
Lange v. *United States*, 61 C. Cls. 666, certiorari denied, 273 U. S. 708	8
Levering & Garrigues Co. v. *United States*, 73 C. Cls. 508	7, 8
McCord v. *United States*, 9 C. Cls. 155, affirmed *sub nom.* *Chouteau* v. *United States*, 95 U. S. 61	8
Moran Bros. Co. v. *United States*, 61 C. Cls. 73	8
Newport News Shipbuilding & Dry Dock Co. v. *United States*, 79 C. Cls. 1, 79 C. C's. 25, 79 C. Cls. 37, 79 C. Cls. 46	8
Plato v. *United States*, 86 C. Cls. 665	9
Snare & Triest Co. v. *United States*, 75 C. Cls. 326	8
Swift Co. v. *United States*, 14 C. Cls. 208; 14 C. Cls. 235	8
United States v. *McShain*, 308 U. S. 512	7
United States v. *Spearin*, 248 U. S. 132	9
Wells Bros. Co. v. *United States*, 254 U. S. 83	8
Wood v. *United States*, 258 U. S. 120	8
Young-Fehlhaber Pile Co. v. *United States*, 90 C. Cls. 4	10
Statute:	
Act of July 23, 1937, c. 520, 50 Stat. 533 (U. S. C., Supp. V, Title 28, §250b)	11–12
Miscellaneous:	
H. Rept. No. 296, 75th Cong., 1st Sess., p. 3	10
S. Rept. No. 645, 75th Cong., 1st Sess., p. 4	10
81 Cong. Rec. 7081	10

294965—41

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 675

ENOS L. SEEDS AND JOHN DERHAM, JR., INDIVIDUALLY AND TRADING AS SEEDS & DERHAM, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The special findings of fact, conclusion of law, and opinion of the Court of Claims (R. 61) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 7, 1940 (R. 190). The petition for a writ of certiorari was filed on January 4, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether, under Articles 3 and 4 of a standard form Government contract, a contractor accepting without protest change orders modifying the specifications of the original contract and allowing additional compensation on account of the changes, may recover damages for delays resulting from the changes.

2. Whether the Act of July 23, 1937, conferring jurisdiction upon the Court of Claims to pass upon claims of certain contractors for alleged excess costs incurred "by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts," directs the award of damages in a case in which the contract provided that the persons to be employed on the project should be taken from the relief rolls, and the labor thus obtained was of a quality equal to the average ordinarily obtainable from the relief rolls.

STATUTE INVOLVED

The Act of July 23, 1937, c. 520, 50 Stat. 533, 28 U. S. C. § 250b, is set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

In December 1935, petitioners entered into a contract with the United States, on the standard Government form, to construct a dam in the Ohio River parallel to and abutting on an existing dam (Fdg. 2, R. 62). The contract provided that the

new dam was to be built in four successive cofferdams, the first of which had already been constructed but not dewatered. The existing dam was to serve as the downstream arm of each of the cofferdams (Fdg. 3, R. 63). When petitioners attempted to dewater the cofferdam which had been built previously, they discovered that there were large holes underneath the old dam which made its use as the lower arm of the cofferdams impossible (Fdg. 4, R. 63). In order to remedy this unforeseeable condition, it was determined to build a steel sheet wall one foot upstream from the old dam and parallel to it, and to fill in the intervening space with concrete (Fdg. 4, R. 63). These changes were embodied in change order No. 1, which set $110,159.66 as the estimated cost of the change, and which was in the form of a modification of the original contract and was accepted by petitioners as such (Fdg. 4, R. 63). Petitioners performed the work and accepted without protest the $110,159.66 (Fdg. 5, R. 64).

This change order was issued pursuant to Articles 3 and 4 of the contract (R. 50, Fdg. 5, R. 63). Article 4 provides for changes due to "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications," and for equitable adjustment of prices and terms, according to the procedure established by Article 3 (R. 64). The latter article (R. 63–64) reserves to the contracting officer the right to make changes altering the speci-

fications and drawings, within the general scope of the contract, and provides for an "equitable adjustment," by agreement of the parties, of the amounts due under the contract or in the time required for performance. If the parties cannot agree upon an adjustment, the dispute is to be resolved as provided in Article 15, the general clause (R. 65) regarding disputes arising under the contract, which provides that an appeal may be taken by the contractor to the head of the department or his duly authorized representative, "whose decision shall be final and conclusive upon the parties thereto".

Thereafter, change order No. 5, covering 292 additional piles made necessary by the unanticipated condition of the old dam, was issued under Articles 3 and 4 (R. 51–52), and was accepted by petitioners (Fdg. 13, R. 69). Petitioners received $13,560.89 for this work, and their time was extended (R. 52).

More than a year after the issuance of change order No. 1, petitioners presented various claims for losses due to idle labor and equipment, attributed by them to delays consequent upon the changes (Fdg. 5, R. 64–65; Fdg. 7, R. 66; Fdg. 13, R. 69). The contracting officer rejected these claims on the ground that the adjustments contained in the change orders covered all claims connected with changes (Fdg. 5, R. 65; Fdg. 7, R. 66; Fdg. 13, R. 69–70). Petitioners appealed under Article 15 of the contract from some, but not all, of the decisions of the contracting officer

and his decisions were affirmed (Fdg. 6, R. 66; Fdg. 13, R. 69–70).

Due to an unprecedented flood on the Ohio River in 1936, the United States issued change order No. 6, increasing the height of the piers of the dam by six feet (R. 53–57). This change was also accepted by petitioners as a modification of their contract (Fdg. 10, R. 67). Over a year after the issuance of this order petitioners filed two claims for losses due to delays suffered in their work because of this change. The contracting officer disallowed both claims; petitioners appealed from one of these decisions, which was affirmed (Fdg. 10, R. 68).

Petitioners also made claims based on the quality of the labor which they were required under their contract to employ. Article 19 (a) provided that, except for certain key jobs, the labor used on the project should be employed through the United States Employment Service, and that preference should be given to men on the public relief rolls (R. 70). In May 1936 petitioners complained that it was impossible to obtain the necessary labor from the relief rolls, and requested extra compensation and an extension of time. The contracting officer found that a total delay of five days had occurred, and, with petitioners' concurrence, issued change order No. 7 extending the contract time by that length of time (Fdg. 14, R. 71). Except as set out in change order No. 7, there was no shortage of labor, and the labor furnished was of a

quality equal to the average ordinarily obtainable from the relief rolls (Fdg. 14, R. 71).

In November 1938, petitioners brought suit in the Court of Claims to recover for alleged losses due to delay connected with the change orders. Petitioners also included a claim under the Act of July 23, 1937, based on the quality of labor furnished them. The court unanimously held that petitioners' acceptance of the change orders without objection precluded a subsequent action for damages caused by delays. The court also held, one judge dissenting, that since the type of labor obtained by petitioners from the relief rolls was such as should have been anticipated under their contract, the Act of July 23, 1937 did not entitle them to recover.[1]

ARGUMENT

1. Petitioners contend that the inadequacy of the existing dam for the use contemplated by the contract constituted a breach of warranty, and that the change orders issued by the contracting officer because of the defects in the dam did not, and, because of the officer's lack of authority to settle claims for unliquidated damages, could not, make any allowance for the delays resulting from the changes. The existence of any warranty as to the adequacy of the old dam is negatived by Article 4 of the contract, which directs that the

[1] In the court below, petitioners also presented some minor claims which are not pressed here or are at least not relied on as warranting certiorari (Pet. 2, 4–5, 5–6).

necessary changes be made in the drawings and specifications in the event of discovery of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated on the specifications," and that an equitable adjustment be made for any increase in cost and difference in time resulting from such changes. Even assuming, however, that the Government undertook that the dam would be suitable for the use contemplated by the contract, the exclusive remedy for losses caused by latent defects is that prescribed by Articles 3 and 4. Cf. *United States* v. *McShain*, 308 U. S. 512, 520.

There is no basis under the contract for the distinction drawn by petitioners between increase of cost directly incurred in performing the work required by the change orders and increase due to delays, resulting from the changes, in completing the contract. Since Article 4 carries the "reasonable implication" that "if such changes were made, delay in the prosecution of the work might result" (*Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 508, 525), it seems clear, as the court below held (R. 73), that the adjustment to be made under that article for increase in cost includes any increase due to delay. Where, as here, the contractor accepts the change orders and the allowances of additional compensation without protest, he must be deemed to have waived any claim for still further allowances. Such has been the settled rule of the Court of Claims with

respect to change orders within the "general scope" of the contract under Article 3 or similar provisions.[2] No reason is seen for a different rule with respect to change orders issued under Article 4. Since the Government did not warrant the adequacy of the dam for its contemplated use, and, in any event, agreed to make an equitable adjustment if any change in specification was made, the question whether a Government officer has general authority to settle a claim for unliquidated damages is thus not involved.

Karno-Smith Co. v. *United States,* 84 C. Cls. 110, relied on by petitioners (Pet. 13), is clearly distinguishable. In that case the Government apparently did not contend that the acceptance of a change order under Articles 3 and 4 without protest precluded subsequent claims for damages due to delay; as waiving the claims it relied solely on a letter of the plaintiff. In its opinion in that

---

[2] *McCord* v. *United States*, 9 C. Cls. 155, *aff'd sub nom. Chouteau* v. *United States*, 95 U. S. 61, 68; *Swift & Co.* v. *United States*, 14 C. Cls. 208, 232–233; 14 C. Cls. 235; *Moran Bros. Co.* v. *United States*, 61 C. Cls. 73, 102; *Lange* v. *United States*, 61 C. Cls. 666, 682, certiorari denied, 273, U. S. 708; *Carroll* v. *United States*, 69 C. Cls. 435; *Fore River Shipbuilding Co.* v. *United States*, 62 C. Cls. 307, 317; *Newport News Shipbuilding & Dry Dock Co.* v. *United States*, 79 C. Cls. 1, 19–23; 79 C. Cls. 25, 34–35; 79 C. Cls. 37, 45; 79 C. Cls. 46, 53; *Levering & Garrigues Co.* v. *United States*, 73 C. Cls. 508, 523; *Snare & Triest Co.* v. *United States*, 75 C. Cls. 326, 349–350; *cf. Crook Co.* v. *United States*, 59 C. Cls. 593, *aff'd*, 270 U. S. 4; *Wells Bros. Co.* v. *United States*, 254 U. S. 83; *Wood* v. *United States*, 258 U. S. 120.

case the Court of Claims did not refer to Articles 3 and 4, and rejected the defense of waiver on the ground of want of consideration. In *United States* v. *Spearin*, 248 U. S. 132, *Plato* v. *United States*, 86 C. Cls. 665, and *Gillen* v. *United States*, 88 C. Cls. 347, also relied on by petitioners, the question of the effect of the acceptance of a change order without protest was not involved.

2. The Act of July 23, 1937, 50 Stat. 533, confers jurisdiction on the Court of Claims to entertain claims by contractors constructing dams on the Mississippi River and its tributaries for alleged excess costs incurred "by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts * * *." Petitioners contend that the labor supplied them by the Government was not "qualified."

Article 19 (a) of petitioners' contract required them to recruit their labor from persons on the public relief rolls. The court below found, and petitioners do not deny, that "the labor furnished was of a quality equal to the average ordinarily obtainable in the way provided for in the contract" (R. 71). Since petitioners knew that their labor would be drawn from this source, and doubtless adjusted their bid price accordingly (see R. 79), they have received all they were entitled to under the contract. And the Act of July 23, 1937, it is plain, does not provide for recovery in cases where the Government complied with its ob-

ligations "under the labor clauses of the * * * contracts". See also H. Rept. No. 296, 75th Cong., 1st Sess., p. 3; S. Rept. No. 645, 75th Cong., 1st Sess., p. 4; 81 Cong. Rec. 7081.

Young-Fehlhaber Pile Co. v. *United States,* 90 C. Cls. 4, upon which petitioners rely (Pet. 20), is not opposed. The opinion of the court in that case deals solely with the Government's failure to supply a sufficient *quantity* of men to enable the contractor to proceed with his work; moreover, the Government's own officials conceded that the men were not qualified (p. 7). The Government's sole contention was that the United States was under no contractual duty, under Article 19 (a), to furnish any labor at all.

CONCLUSION

The decision of the court below is plainly correct. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
MELVIN H. SIEGEL,
THOMAS E. HARRIS,
Special Assistants to the Attorney General.
OSCAR DAVIS,
Attorney.

FEBRUARY 1941.